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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOSE ANTONIO COOKE, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B132311 (Los Angeles County Super. Ct. No. BS052849)

APPEAL from the judgment of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

David P. Lampkin for Plaintiff and Appellant.

Robert M. Cuen for Defendants and Respondents.

* * * * * *

Appellant Jose Antonio Cooke appeals from a judgment entered after the trial court denied his petition for writ of mandate under Code of Civil Procedure section 1094.5. We affirm.

CONTENTIONS

Appellant contends that the judgment must be reversed because the finding that appellant tested positive for cocaine is based entirely on hearsay evidence that would not be admissible over objection in a civil action, and such evidence is not sufficient to sustain a finding in this proceeding.

FACTS AND PROCEDURAL BACKGROUND

Appellant was employed as a "light bus" driver, student transportation section, by respondent Los Angeles Unified School District (the District). In January 1995, the District established a comprehensive drug and alcohol testing program. The District contracted with CDT, Inc. (CDT), to provide testing. CDT subcontracted with SmithKline Beecham Clinical Laboratories (SBCL).

On October 23, 1995, appellant gave a urine sample which was divided into a primary sample and a split sample. On October 25, 1995, SBCL reported that the primary sample tested positive for cocaine. Appellant requested a test of the split sample, which was analyzed at his request by a different certified Department of Transportation company. The split sample was sent to Corning National Center for Forensic Science (CNCFS). On November 22, 1995, CNCFS reported that the split sample tested positive for cocaine.

As a result of the drug test, appellant's supervisor suspended him immediately. On November 21, 1995, the District terminated appellant. Appellant appealed to the Personnel Commission of the District (the Commission), and evidentiary hearings were held on May 11 and 12, 1998. Caroline Madden, the District's drug and alcohol testing coordinator for the transportation branch, and Dr. David Lewis, the medical review

officer of CDT, testified on behalf of the District and four witnesses testified on appellant's behalf.

At the May 11 and May 12 hearings, Caroline Madden identified the following documents which were admitted into evidence: (1) Exhibit 4 -- a notification to appellant to report for testing on October 23, 1995. (2) Exhibit 6 -- an individual test report showing appellant's name, social security number, and the requisition number assigned to appellant's sample. It indicated a positive test for cocaine and showed SBCL as the laboratory. Dr. David Lewis affixed his facsimile signature to the test results. (3) Exhibit 7 -- an individual test report showing a positive test for cocaine with CNCFS as the laboratory, signed by Dr. Lewis. (4) Exhibit 9 -- a litigation packet given by CDT to Madden which included a custody and control form prepared by SBCL certified by Gary Shimada, the "certifying scientist." (5) A laboratory report dated October 25, 1995, from SBCL addressed to Dr. Lewis at CDT, indicating a positive test for cocaine.

Dr. Lewis testified that as the medical review officer of CDT, he examines tests to see if there is a legitimate medical reason for the positive result and to eliminate a false positive based on medical reasons. He compares the documentation received from SBCL to a chain of custody form to ensure that the social security numbers, telephone numbers, collection dates and times match on each document. After receiving the results of appellant's test, Dr. Lewis called appellant and verified appellant's identity. In response to Dr. Lewis's questions regarding his medical history, appellant indicated that he had been taking aspirin and Tylenol with codeine for headaches. Appellant indicated that he had undergone a dental procedure three months prior to the date of the test. Dr. Lewis stated that there is a minor possibility that a positive test result could occur if a subject is given a very large amount of one of the cocaine types of anesthetics during a dental procedure. Dr. Lewis concluded there was no legitimate medical reason for a positive test in appellant's case. At the hearing, Dr. Lewis identified exhibits including an employee interview checklist, a federal drug testing custody and control form, and a positive test result from CNCFS.

On May 24, 1998, the hearing officer filed his findings and recommendation sustaining the termination. On July 15, 1998, the Commission considered additional argument from appellant, including hearsay objections, but ultimately adopted the findings and recommendations of the hearing officer. On August 17, 1998, appellant filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5.[1] On March 24, 1999, the matter was submitted on the administrative record and arguments of counsel. The trial court filed its statement of decision denying the writ.

This appeal followed.

DISCUSSION

1. Whether the reports generated by SBCL are admissible under an exception to the hearsay rule

On appeal, we review the record to determine whether the trial court's findings are supported by substantial evidence. (*Lake v. Reed* (1997) 16 Cal.4th 448, 461.) The trial court must review the Commission's finding using the independent judgment test. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34.)

Appellant urges that since neither Ms. Madden nor Dr. Lewis had personal knowledge of appellant's tests, but instead relied on reports from SBCL, their testimony concerning the test was hearsay, citing *Lake v. Reed, supra,* 16 Cal.4th 448. We disagree.

Admission of evidence in administrative hearings is subject to a more relaxed standard than in civil trials. Under Government Code section 11513, subdivision (c): "The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."

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[1] All subsequent code section references are to the Code of Civil Procedure unless otherwise indicated.

According to Government Code section 11513, subdivision (d), "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration."

Appellant urges that the reports of SBCL upon which Dr. Lewis and Ms. Madden based their testimony do not fall within the scope of the public employee records exception to the hearsay rule under Evidence Code section 1280 which provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of the duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Appellant argues that the writings were not made within the scope of duty of a public employee. However, we conclude that the independent laboratories retained by the District were its agents, and therefore are "public employees" for the purposes of Evidence Code section 195, which defines a public employee as "an officer, agent, or employee of a public entity." Accordingly, Madden and Lewis properly relied on the reports generated by SBCL, which fell within the public employee records exception to the hearsay rule. *Imachi v. Department of Motor Vehicles* (1992) 2 Cal.App.4th 809, 816-817 (*Imachi*), supports our conclusion. There, the First District determined that a report of a blood test performed by a licensed forensic laboratory on behalf of the law enforcement agency falls within the public employee records exception to the hearsay rule. The court stated that forensic laboratories must meet strict standards to be licensed. For instance, the laboratories must conduct analysis in accordance with specified standards of performance and procedure, and are regulated by a quality control program adopted by the Department of Health Services. (*Ibid.*) The court concluded that the

actual written report generated by the laboratory would fall within the exception because, "[w]hether or not the forensic laboratory in question was itself a public entity, the analyst performing chemical tests for a law enforcement agency would be a 'public employee' within the statutory definition of that term, which includes 'an officer, agent, or employee of a public entity.'" (*Id.* at p. 817, fn. 5.) *Santos v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 537, followed *Imachi, supra*, 2 Cal.App.4th at page 817, holding that a document on letterhead from the Institute of Forensic Sciences identifying the results of a blood test on the plaintiff as a .13 percent blood alcohol content falls within the public employee records exception to the hearsay rule.

We are not persuaded by appellant's argument that SBCL and its employees cannot be held to be public employees for purposes of Evidence Code section 195. Appellant's point that there was no contract between the District and SBCL, because CDT subcontracted with SBCL does not preclude an agency relationship between the District and SBCL. That is, if an agent is authorized by the principal to employ a subagent, the subagent has the same duties to the principal as to the agent. (*Streit v. Covington and Crowe* (2000) 82 Cal. App. 4th 441, 446 fn. 3; Civ. Code, § 2351.)

We disagree with appellant's further argument that SBCL is not an agent because the District had no right to control SBCL. School bus drivers must comply with the controlled substances and alcohol use and testing requirements of title 49 Code of Federal Regulations part 382 (2000). (*Menge v. Reed* (2000) 84 Cal.App.4th 1134, 1139 (*Menge*).) Thus, *Menge* recognized that drivers are required to submit to random drug and alcohol testing. (49 C.F.R § 382.211 (2000).) Moreover, the federal regulations relating to the testing of school bus drivers preempt state or local regulations. (49 C.F.R § 382.109 (2000).) We note that the procedures and reporting requirements by the medical review officer are strictly regulated under the Code of Federal Regulations. (49 C.F.R. §§ 382.407, 382.409 (2000).) According to the "Medical Review Officer Manual for Federal Workplace Drug Testing Programs," a technical report issued by the Department of Health and Human Services, and contained in the record, laboratories must be certified under the National Laboratory Certification Program before they are

permitted to test specimens collected for federal agency drug testing programs. Each laboratory must complete an initial inspection prior to certification, a three-month inspection after certification, and semi-annual maintenance inspections thereafter. Compliance with performance testing programs is also required. The laboratories must have a standard operating procedure manual that includes a complete description of the laboratory's chain-of-custody procedures, analytical testing procedures, quality control program, equipment and maintenance, security, personnel qualifications and training, and reporting procedures. The urine specimen must be analyzed by a test approved for commercial distribution by the Food and Drug Administration.

Thus, as in *Imachi*, *supra*, 2 Cal.App.4th at page 816, the strict regulation of laboratories indicate an agency relationship.

Nor are we convinced by appellant's argument that the SBCL litigation packet and the CNCFS report were not admissible because a custodian or other qualified witness did not testify as to the identity or mode of preparation of these reports. He urges that Lewis and Madden were not familiar with the procedures used by SBCL or CNCFS. However, the record shows that the litigation packet given by CDT to Madden included a custody and control form prepared by SBCL, which was certified by Gary Shimada, as follows: "I certify that the specimen identified by the laboratory accession number on this form is the same specimen that bears the specimen identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements, and that the results set forth are for that specimen." According to an affidavit attached to SBCL's documents, the litigation packet was reviewed by Charles LoDico, the senior certifying scientist, and they contained true and accurate copies of all documentation relevant to the patient. He certified that he maintains CNCFS as a secure area. Accordingly, the evidence established that the documents were certified by a custodian of records or other qualified witness. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1448 [witness who vouches for record's authenticity must be knowledgeable about identity of the record and mode of preparation, but need not observe or record the act.].)

We conclude that the reports were admissible under Evidence Code section 1280.

2. Whether the hearsay evidence is insufficient under Government Code section 11513

Under Government Code section 11513, subdivision (d): "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." Appellant first contends that he made timely objections to the hearsay evidence, including, that Dr. Lewis was allowed "to testify from the questionable records of District Exhibit," and that Dr. Lewis is not a public employee. In the same vein, appellant contends that under rule 904(K) of the rules of the Commission, hearsay shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action. Since we have found that the reports were admissible under Evidence Code section 1280, we need not address the timeliness of appellant's objections or the applicability of rule 904(K) of the rules of the Commission.

3. Whether the Commission improperly relied on evidence outside the record

Appellant contends that the Commission must have relied on evidence outside the record based on two comments made by the District during the hearing. During opening comments, the District stated: "Due to the passage of time, it's now been 2-1/2 years, the personnel commission and its hearing officers are by now quite familiar with this testing program, therefore the district will present a streamline[d] case this morning, composed of two witnesses." After the presentation of its two witnesses, the District rested, stating: "Otherwise, in light of the personnel commission[']s extensive familiarity with this program, we believe we have made a [prima facie] case and would rest at this time."

Our review of the hearing shows that substantial evidence supports the trial court's decision to deny the writ petition, and that the District did not simply skimp on the

evidence as implied by appellant. The record shows that appellant took a drug test on October 23, 1995. The evidence supported the trustworthiness of the urine sample collection, method of preparation, chain of custody, as well as the various documents which were submitted to the hearing officer and the Commission. The urine sample was marked, sealed intact, and certified by Gary Shimada, the "certifying scientist," as being the same sample as initially taken. The drug testing documents were also made a part of the record. Moreover, both the initial and confirmatory test showed positive results for cocaine. The results of the test were submitted to CDT's medical review officer, Dr. David Lewis, who testified at the hearing and confirmed that he received the results of the test and subsequently interviewed appellant. The split sample was sent to CNCFS, which is not associated with the first testing laboratory. The retest also tested positive for cocaine.

Appellant's argument that the District relied on matters outside the record is speculative. The comments pointed out by appellant merely indicate a familiarity with the testing program. We conclude that substantial evidence supported the trial court's denial of appellant's petition for writ of mandate.

DISPOSITION

The judgment is affirmed. Respondent shall receive costs on appeal.

NOT FOR PUBLICATION.

_____, J.

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We concur:

_____, P.J.

BOREN

_____, J.

COOPER